Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

July 1 through September 30, 2005

Production Summary 2
Production Charts 3
Communications 4
Judicial Review Summary 5
Recent Decisions 9

Production Summary

- The active inventory totalled 5,398 (35% over the target of 4,000 cases).
- Incoming appeals numbered 1,070; of these, 828 were appeals from WSIB decisions and 242 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 1018 new appeals and 179 reactivated appeals recorded in the second quarter of 2005.
  - In the 3rd quarter of 2004 the Tribunal recorded 861 new appeals and 194 re-activations.
  - In 2004, the weekly average of hearing ready appellants was 74. For Q3 2005, the weekly average of hearing ready appellants is 75. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 1,018; this includes 481 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 537 after hearing dispositions; of the after hearing dispositions, 507 followed from Tribunal decisions.
- The inactive inventory decreased by 8 cases to 4,233 (at the end of Q2-05, inactive inventory was 4241 cases).
- In Q3 2005, 84% of final decisions were released within 120 days.
- Due to a lack of adjudicative resources, the Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. This also led to delays in the pre-hearing areas.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2005, the notice inventory included 1,519 dormant cases, the active inventory totaled 5,398 cases, and the inactive inventory totaled 4,233 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q3-2004	5154
Q4-2004	5196
Q1-2005	5164
Q2-2005	5359
Q3-2005	5398

B. Incoming Appeals

Period	Incoming Appeals
Q3-2004	1055
Q4-2004	1124
Q1-2005	1124
Q2-2005	1197
Q3-2005	1070

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q3-2004	982	425	557
Q4-2004	1119	472	647
Q1-2005	1136	456	680
Q2-2005	1047	416	631
Q3-2005	1018	481	537

D. Inactive Inventory

Period	Inactive Inventory
Q3-2004	4194
Q4-2004	4140
Q1-2005	4188
Q2-2005	4241
Q3-2005	4233

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q3-2004	1568	25
Q4-2004	1531	-37
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

The Tribunal organized and hosted a very successful Symposium in honour of its 20th Anniversary. The event was held October 6th, 2005 and consisted of 3 Panels, followed by a reception. Speakers included David Mullan, professor emeritus, Queen's University law School, The Honourable Justice S. T. Goudge, Ontario Court of Appeal, John Slinger, chief corporate services office of the WSIB, Ian J. Strachan, Chair, WSIAT and S. Ron Ellis, past chair, WCAT.

In June, several Tribunal staff were presenters at the Council of Canadian Administrative Tribunal's Annual Conference. Carole Prest, Counsel to the Chair, participated in a round table discussion. David Bestvater, Director of IT Case Management participated in a workshop and the Tribunal's case management system, tracIT, was showcased as an exhibit. As a result of the participation by Tribunal IT staff, the Immigration and Refugee Board expressed an interest to meet to discuss change management related to implementation of case management systems. This meeting occurred in September 2005.

Also in June, Tribunal and WSIB staff met as part of the ongoing Quality Loop Group to discuss various administrative matters and issues.

In early September, the Tribunal held a mandatory training day for adjudicators. The topics were epidemiology of occupationally induced cancers, followed by a discussion of the Final Report of the Chair of the Occupational Disease Advisory Panel, which was recently approved by the Board of Directors, and the companion protocols.

In September, Dan Revington, General Counsel, spoke at the Ontario Bar Association's Ron Ellis Award Dinner. The award is presented to recognize outstanding achievement to workplace safety and insurance law. David Gorelle, a well-known employer side lawyer was the recipient for 2004-5.

Also in September, Vice-Chair Registrar Martha Keil and Susan Adams, Counsel, participated on a panel for a continuing legal education session organized for the Law Society of Upper Canada. The session title was Your WSIB Practice: A Critical Update. M. Keil provided practice and presentation tips for hearings; S. Adams talked about right to sue applications.

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the third quarter of 2005 are set out below. Only those judicial reviews where there was activity during the quarter are listed. There are a number of other pending judicial reviews in which there was no action during this particular quarter.

Judicial Reviews

1. Decisions Nos. 770/98I (October 27, 1999) and 770/98IR (February 5, 2002)

As noted in earlier quarterly reports, on April 7, 2005, the Court of Appeal unanimously granted the Tribunal's appeal from a decision of the Divisional Court which had quashed the above Tribunal decision.

This case involves worker who was granted chronic pain entitlement by the Board, but was awarded no future economic loss. She appealed this to the Tribunal, alleging she did not have chronic pain, but instead had an organic condition known as traumatic vertebrobasilar ischemia (TVBI). The Tribunal dismissed the appeal, and confirmed the worker had chronic pain. In coming to this finding, the Panel concluded the worker had hit her head once at the time of her accident.

The worker then requested the Tribunal reconsider the finding in *Decision 770/98I* that she had a non-organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her

reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision 770/98IR*, the Panel denied the reconsideration, and confirmed the worker did not have TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

The worker applied for judicial review of the decision that she did not have an organic condition.

The judicial review was heard in Divisional Court on April 19, 2004. The Court found the Tribunal's decision was patently unreasonable. The Divisional Court's decision, which is not long, focused on two paragraphs of the reconsideration decision. The Court was not satisfied about the way the Panel had dealt with the co-worker's affidavit on the reconsideration in regards to the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had not satisfactorily dealt with the conflict in the medical evidence.

At the Court of Appeal the Tribunal took the position that the Divisional Court had failed to appreciate the Tribunal's decision was written the way it was because it was a reconsideration of its first decision. The test on a reconsideration is whether there was good reason to believe there was a significant defect in the decision that would change the result of the original decision. Further, the Tribunal argued the reasons provided by the Panel in rejecting the affidavit were more than adequate, and the decision was certainly not patently unreasonable.

The Court of Appeal granted the Tribunal's appeal. MacPherson J., writing for the Court, reaffirmed the standard of review was patent unreasonableness. He stated that the Divisional Court had erred in its conclusion that the Tribunal decision should be quashed. Contrary to the findings of the Divisional Court, the Court of Appeal found the Tribunal's decision had focused on the correct issue; that it had sufficiently explained the rejection of the affidavit evidence; and the Tribunal had dealt extensively with all the medical evidence and had explicitly resolved the conflicting opinions of the physicians.

The Court of Appeal stated:

"The Tribunal carefully considered all the evidence and reached, and explained, its decision. In short, the Tribunal did precisely what it was supposed to do."

The Court of Appeal set aside the decision of the Divisional Court and reinstated the final decision of the Tribunal.

The Applicant filed an application for leave to appeal to the Supreme Court of Canada. During this quarter the Tribunal filed a responding factum. As of the end of the quarter the Tribunal was awaiting a decision of the Supreme Court as to whether leave to appeal has been granted.

2. Decision No. 1509/02 (February 2, 2004)

Two sisters were suspended for smoking in a non-smoking area at work. The sister in this case (Sister #1) reported an accident later that day, before the suspension took effect. The worker's sister (Sister #2) reported an accident within a few hours of returning after her suspension.

Sister #2's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision No. 1384/03), so she brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

Sister #1's claim was allowed by the Board. The employer appealed, and the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker. Sister #1 then brought an application for judicial review.

Although Sister #2's judicial review was dismissed, Sister #1 stated that she would still proceed with her judicial review. However, at the end of the quarter Sister #1 was considering adjourning the judicial review application and filing a reconsideration.

3. Decisions Nos.1584/02 (July 15, 2003) and 1584/02R (June 16, 2004)

The worker, a car salesman, had a congenital lesion in his brain which was asymptomatic until 1993. In 1991 he suffered an injury when the rear door on a van was accidentally shut on his head. The worker did not seek any medical attention for this injury. Eighteen months later the worker had a seizure, and alleged it was caused by the head injury. The Panel denied the worker's appeal, finding there was no entitlement for the seizures.

The worker brought an application for judicial review. The Tribunal filed its factum in January 2005. This judicial review is scheduled to be heard on November 29.

4. Decision No. 117/04 (September 27, 2004)

This right to sue decision found that a courier was a worker, rather than an independent operator, and that his right of action was therefore taken away. Counsel for the worker has commenced an application for judicial review.

The Divisional Court in London has advised the judicial review will be heard on November 9.

5. **Decisions Nos. 3536/00 (January 8, 2001), 3536/00ER (August 10, 2001), 3536/00R2 (May 5, 2003) and 3536/00R3 (July 5, 2005)**

The worker's paralegal representative failed to file an appeal in time. The worker's application to extend the time limit on the basis of the representative's negligence was denied. Two applications for reconsideration were dismissed.

The worker retained counsel, who commenced an application for judicial review. Materials were filed by the Tribunal and worker. However, counsel for the worker decided to adjourn the judicial review, and commence a further reconsideration application.

This third reconsideration was successful. Decision 3536/00R3 granted the time extension. The judicial review application has now been withdrawn.

6. **Decision No. 1858/99 (February 10, 2000), 1858/99R (December 27, 2000), and 1858/99R2 (April 15, 2005)**

This Tribunal decision denied a s.147(4) supplement. The Applicant commenced a judicial review, and then asked to adjourn it to pursue an application for reconsideration.

The reconsideration was denied by a different Tribunal Panel. At the end of the quarter the Tribunal was waiting to see if the applicant will proceed with the judicial review.

7. **Decision No. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)**

The Tribunal denied the worker's appeal for an increased future economic loss and non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review. There are problems with the worker's materials, and at the end of the quarter the Tribunal was waiting for the Applicant to revise and re-serve the materials.

Recent Decisions

Tribunal Jurisdiction (Assignment Agreement): **Decision No. 388/05** considered the jurisdiction of the Tribunal to consider whether an insurer was entitled to interest payments which the Board paid to the worker's estate due to the terms of the Assignment Agreement between the insurer and the worker's estate. The Board reimbursed the insurer for the cost of the benefits it paid to the worker's estate, however, the interest that accrued was given to the worker's estate. This was due to the fact that under Board policy, interest can only be paid to the worker or the worker's estate and cannot be assigned to a third party. The Panel held that while the insurer had standing to bring the appeal, the Tribunal did not have the jurisdiction to consider this appeal. Subsection 123(1) cannot be interpreted to include the matter of whether the Board or the worker's survivor have fulfilled the terms of the Assignment Agreement. This is a distinct issue from the survivor's entitlement to compensation benefits under the insurance plan.

Consequences of Injury (altered gait) (crutches): **Decision No. 1777/02R2** considered whether a worker had entitlement for upper back, neck and shoulder pain due to his use of crutches and a cane for two to three years following an ankle injury. In *Decision No. 1777/02R* the Vice-Chair granted the reconsideration threshold test and allowed the reconsideration on the merits on the basis that the issue was novel. The Vice-Chair requested an opinion of a Tribunal medical assessor. The assessor's report provided a medical description of the biomechanics of the spine, including when walking with a cane or crutches. Based on the opinion of the assessor, the Vice-Chair found that the worker had entitlement for upper back and shoulder pain but not for neck pain.

Standing and Parties (interest of worker) (employer penalty): **Decision No. 619/05** considered whether the worker was entitled to information about whether a fine had been levied against the employer for late filing of the employer's report of two accidents. The Panel held that the worker was not entitled to the information, as he did not have standing. The worker's status as a party of record is dependent on whether the information requested is properly determined to be relevant for the worker's claim for benefits. The issue of whether a fine was imposed on the employer was not relevant to the worker's benefits.

Notice of Accident (by worker): **Decision Nos. 1117/05, 1136/05 1072/05** and **1073/05** are some of the first decisions which consider whether a worker is entitled to a time extension due to late filing of the worker's claim under section 22 of the *Workplace Safety and Insurance Act*. All of the decisions applied the exceptional circumstances test outlined in *Operational Policy Manual* Document #15-01-03 and also considered subsection 22(3) which permits a claim to be filed after the six-month period expires if it is just to do so.

Permanent impairment (NEL) (rating schedule) (AMA Guides): **Decision No. 1321/05** considered whether the worker's NEL award was correctly calculated at 38%. The Vice-Chair increased the rating to 39% due to one aspect of the assessment but for the most part agreed with the NEL assessment performed by the Board. The worker submitted that the Board should have provided the NEL roster physician with an Activities of Daily Living (ADL) form to complete. However, the Vice-Chair noted that the Board no longer provides the ADL form on a number of assessments, including low back assessments. The AMA Guides provide a range of percentage impairments for certain conditions. For such conditions, the Board takes into account the impact on activities of daily living. However, for other conditions, the AMA Guides prescribe a specific percentage of impairment, leaving no discretion. All of the worker's impairment were listed in Tables in the AMA Guides that have specific percentages of impairment. Accordingly, the physician did not complete an ADL form and no ADL form was necessary.

October 2005